LIBRARY

Office-Supreme Court, U.S.
FILED
AUG 13 1964
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. 379

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,
Petitioners,

vs.

BIRDIE MAE DAVIS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, CHARLES E. McNEIL, WILLIAM B. CRANE, JACK C. GALLALEE, ARTHUR F. SMITH, KENNETH REED and CRANFORD H. BURNS, Petitioners.
By GEORGE F. WOOD,
PALMER PILLANS,
A. L. PHILIPS, JR.,
Counsel for Petitioners.

ST. LOUIS LAW PRINTING CO., INC., 415 N. Eighth Street. CEntral 1-6477

INDEX.

	Page
Prayer	1
Opinions below	2
Judgment sought to be reviewed	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement of the case	3
Reasons for granting the writ	4
Appendix:	
Opinion of Court of Appeals, July 9, 1963	7
Opinion of Court of Appeals, July 18, 1963	13
Opinion of Court of Appeals, June 18, 1964	19
Judgment of June 18, 1964	23
Order denying petitions for rehearing	24

Cases Cited.

Dobson v. United States, 31 F. 2d 288	5
Fink v. Continental Foundry and Machine Co., 240 F. 2d 369	5
Nachod et al. v. Engineering & Research Corp., 108 F. 2d 594	5
Western Electric Co., Inc. v. Cinema Supplies, Inc., 80 F. 2d 111, 112	5

Statutes Cited.

28 U. S. C., Sec. 1254 (1)	2, 3
28 U. S. C., Sec. 1291	3, 5
28 U. S. C., Sec. 1292	3, 5
28 U. S. C., Sec. 1651	3
28 U. S. C., Sec. 2101 (f)	3
28 U. S. C., Sec. 2106	3

Textbooks Cited.

4 C. J. S., Appeal and Error, Sec. 94 (b)	4
36 C. J. S., Federal Courts, Sec. 301 (48)	5

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

No. .....

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,
Petitioners,

vs.

BIRDIE MAE DAVIS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Board of School Commissioners of Mobile County, Charles E. McNeil, William B. Crane, Jack C. Gallalee, Arthur F. Smith, Kenneth Reed and Cranford H. Burns, pray that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Fifth Circuit on (1) Appeal from an order of the United States District Court for the Southern District of Alabama, entered June 24, 1963, denying a motion for a preliminary injunction in a suit seeking the desegregation of the Mobile County school system; and on (2) An Appeal from an order of the District Court approving a plan presented by petitioners whereby desegregation would be accomplished; said plan having been presented pursuant to the order of the District Court entered in response to the mandate of the Court of Appeals.

OPINIONS BELOW.

The opinions below are printed as appendices to this petition. The opinion of the Court of Appeals, dated July 9, 1963, 322 F. 2d 356, when the denial of the preliminary injunction was first reviewed, is at Appendix, p. 7; the opinion of the Court of Appeals on petition for rehearing, dated July 18, 1963, 322 F. 2d 359, is at Appendix, p. 13; the opinion of the Court of Appeals, dated June 18, 1964, ... F. 2d ..., dealing with the plan submitted by petitioners, is at Appendix, p. 19; and the denial of the petition for re-hearing, without opinion, dated July 21, 1964, is at Appendix, p. 24.

JUDGMENT SOUGHT TO BE REVIEWED.

The judgment entered by the Court of Appeals on June 18, 1964, at Appendix, p. 23.

JURISDICTION.

The jurisdiction of this Court on petition for certiorari is invoked under 28 U. S. C., Sec. 1254 (1).

QUESTIONS PRESENTED.

(1) Whether, in reviewing the order and memorandum opinion of the District Court, in which a motion for preliminary injunction had been denied; the actions of the Court of Appeals in expressing the opinion that the District Court was in error; finding that the District Court had abused its discretion; and in issuing a mandate requiring the District Court to grant the preliminary injunction sought by Appellants, though ostensibly an injunction pending appeal; was in reality a reversal and remand of the lower court order?

(2) Whether the Court of Appeals was thereby divested of jurisdiction over the Appeal?

(3) Whether an interlocutory order of the District Court approving a plan for desegregation was appealable when it neither granted, continued, modified, refused or dissolved injunctions nor refused to dissolve or modify an injunction?

STATUTES INVOLVED.

The statutes involved are Title 28, U. S. C., Sections 1291, 1292, 1254 (1), 1651, 2101 (f), and 2106.

STATEMENT OF THE CASE.

This action was commenced in the District Court of the United States for the Southern District of Alabama on March 27, 1963. The complaint sought an order (1) desegregating the school facilities of Mobile County, Alabama, or, in the alternative (2) requiring the presentation of a plan by the petitioners to accomplish the desegregation. A motion for preliminary injunction was filed contemporaneously therewith seeking IDENTICAL relief.

The motion for preliminary injunction was heard and, on June 24, 1963, an order, with memorandum opinion, was entered by the District Court denying the preliminary injunction. The plaintiffs below appealed, sent up the entire record to the Court of Appeals, and filed therein a motion seeking AN INJUNCTION PENDING APPEAL. Instead of issuing or denying an injunction pending appeal, the Appellate Court reviewed in detail the memorandum opinion of the District Court (Appendix, p. 9); expressly disagreed therewith (Appendix, p. 9); found that the District Court had abused its discretion in denying the motion for preliminary injunction (Appendix, p. 10); rejected the granting of relief under the "All writs" statute (Appendix, p. 10); and, issued its mandate directing the District Court to enter an order grant-

ing the relief prayed for, and which had been denied below, in the motion for preliminary injunction.

The District Court then entered the required order; on petition for re-hearing, the Court of Appeals clarified its prior mandate and thereby altered it slightly (July 18, 1963, Appendix, p. 13). The District Court pursuant thereto, entered the appropriate order calling for the production of a plan.

Petitioners in due course filed a plan, commencing in 1963. Plaintiffs below filed objections thereto, and, following argument, the plan was approved by the District Court, with modifications. Plaintiffs below appealed from this order (this appeal we shall denominate as Appeal No. 2).

Petitioners filed a motion to dismiss the Appeal No. 2, which was denied by the Court of Appeals. Both appeals were then set for argument and on June 18, 1964, the Court of Appeals entered its mandate and opinion, calling for an accelerated plan from Petitioners.

REASONS FOR GRANTING THE WRIT.

Briefly stated, the first appeal resulted in a reversal and remand, under date of July 9, 1963 (as clarified and altered upon re-hearing on July 1[illegible], 1963); the Court of Appeals thereby divested itself of jurisdiction thereof or, in the alternative, lost jurisdiction upon expiration of the term, and had no jurisdiction to review the interlocutory order of the District Court approving the plan. It was, therefore, without jurisdiction to enter the mandate and accompanying opinion of June 18, 1964.

Whatever may be the form it takes, the substance of a judgment, decree or mandate governs its effect. 4 C. J. S., Appeal and Error, Sec. 94 (b). Whatever the respondents here may have considered it, the mandate

and accompanying opinion of July 9, 1963 (as clarified on July 18, 1963), **was a reversal and remand** of the District Court denial of the preliminary injunction. Measured by all the elements, it had only the effect of reversing and remanding. The memorandum opinion of the District Court was considered directly and its conclusions were rejected. The District Court was found to have abused its discretion in denying the preliminary injunction; the Court of Appeals considered its own power to issue an injunction under the "All-writs" statute and expressly turned away from it; instead choosing to issue a mandate to the District Court; and it then ordered by that mandate, the District Court to grant the exact preliminary relief sought, which the District Court did.

The mandate issued and the term having expired, the Court of Appeals lost its jurisdiction over the first appeal. **Dobson v. United States**, 31 F. 2d 288; **Nachod, et al. v. Engineering & Research Corp.**, 108 F. 2d 594; 36 C. J. S., Federal Courts, Sec. 301 (48).

Or, to put it in the alternative, the preliminary injunction issued from the District Court pursuant to the mandate, the appeal became moot and, under either theory, should have been dismissed on petitioner's motion below. **Western Electric Co., Inc. v. Cinema Supplies, Inc.**, 80 F. 2d 111, 112; **Fink v. Continental Foundry and Machine Co.**, 240 F. 2d 369.

The order from which Appeal No. 2 was taken, was an order approving a plan; and was an interlocutory order. It did not grant, refuse, continue, modify, nor refuse to dissolve or modify an injunction; nor did it fall within any other category of interlocutory orders that would support an appeal; **Title 28, U. S. C., Sections 1291, 1292**; hence, there was no jurisdiction in the Court of Appeals to review that order.

The Court of Appeals, being without jurisdiction over either appeal, had no authority to issue the mandate and opinion of June 18, 1964, and this Honorable Court should, with respect, issue a writ of certiorari to review that mandate and order.

Respectfully submitted,

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, CHARLES E. McNEIL, WILLIAM B. CRANE, JACK C. GALLALEE, ARTHUR F. SMITH, KENNETH REED and CRAWFORD H. BURNS, Petitioners.

By .....

GEORGE F. WOOD,
PALMER PILLANS,
A. L. PHILIPS, JR.,
Counsel for Petitioners.

I certify that a copy of the foregoing petition was on the .... day of August, 1964, served on counsel for respondents by mailing a copy to Mr. Vernon Z. Crawford, 578 Davis Avenue, Mobile, Alabama, and Mr. Clarence E. Moses, 1050½ Davis Avenue, Mobile, Alabama, by United States mail, postage prepaid.

.....

APPENDIX.

OPINIONS OF THE COURT OF APPEALS.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 20657.

Birdie Mae Davis et al.,
Appellants,
versus
Board of School Commissioners of Mobile County et al.,
Appellees.

On Motion for Injunction Pending Appeal and for Other Orders.

(July 9, 1963.)

Before Brown, Wisdom and Bell, Circuit Judges.

Per Curiam: Plaintiffs here seek an injunction by this Court pending our determination of the merits of an appeal from an order entered on June 24, 1963, by the District Court for the Southern District of Alabama. This suit originated when Plaintiffs filed a class action seeking the desegregation of the Mobile County school system. Plaintiffs sought an immediate order requiring the Defendant School Commissioners to submit a plan of desegregation within thirty days. This motion was denied by the District Court. In the alternative, Plaintiffs sought a preliminary and permanent injunction prohibiting the further operation of segregated schools. The

Court took this motion under submission and ordered briefs to be filed within a specified time. Plaintiffs appealed from this ruling asserting that the failure to immediately rule on the motion for preliminary injunction amounted to a denial of the motion. On that appeal, this Court held that the trial Judge had not abused his discretion. **Davis v. Board of School Commissioners of Mobile County**, May 24, 1963, ... F. 2d ... [No. 20558].

Subsequently, the District Court held a hearing and made the following determination. By its order of June 24, the Court denied Plaintiffs' motion for preliminary injunction. The case was set for trial on November 14, 1963, and the Defendants were directed "to present at the trial * * * a specific plan for the operation of the schools under their authority and control on a racially non-discriminatory basis, consistent with the principles established by the Supreme Court, to commence not later than the beginning of the 1964-65 school year." It is from this order that Plaintiffs have appealed to this Court, seeking in the meantime an injunction requiring the Mobile County schools to commence integration not later than September, 1963.

We are in agreement with Plaintiff's theory. The Defendant Board has not come forward with an acceptable reason why the integration program should be further delayed. No one disputes that the public schools of Mobile County are presently operated on a segregated basis.

> "It is now more than nine years since this Court held in the first **Brown** decision * * * that racial segregation in state public schools violates the Equal Protection Clause of the Fourteenth Amendment.
>
> * * *
>
> "Given the extended time which has elapsed, it is far from clear that the mandate of the second **Brown** decision requiring that desegregation proceed with

'all deliberate speed' would today be fully satisfied by types of plans or programs for desegregation of public educational facilities which eight years ago might have been deemed sufficient. **Brown** never contemplated that the concept of 'deliberate speed' would countenance indefinite delay in elimination of racial barriers in schools * * *." **Watson v. City of Memphis**, 1963 ... U. S. ... S. Ct. ..... L. Ed 2d ... [31 L. W. 4498].

"Now * * * eight years after [the second **Brown** decision] was rendered and over nine years after the first **Brown** decision, the context in which we must interpret and apply this language ['all deliberate speed'] to plans for desegregation has been significantly altered." **Goss v. Board of Education of City of Knoxville**, 1963. ... U. S. ... S. Ct. ... L. Ed. 2d ... 431 L. W. 4559].

The District Judge in his memorandum opinion discusses two principal reasons why preliminary injunctive relief should not now be granted. The first is that there would be an impossible administrative burden placed on the school system. The second is the Court's belief, based upon experience over the past several years in other race civil rights matters, that if this action is not too hastily taken, the problem will work itself out with no strife or similar consequences.

For reason which bear on both of them, we think neither of these grounds is sufficient. The administrative problem is not one created by the Plaintiffs. They have for nearly a year sought without success to get the school authorities to desegregate the schools. The fact that the suit was not filed until March, 1963, is not therefore of controlling importance. As to the second ground, there is nothing on the present record to afford either the District Judge or this Court any assurance that the requested forebearance will produce effective results. The Defend-

ants have not even answered as yet. They have filed a motion to dismiss for failure to state a claim. Although it seems to be acknowledged on all hands that a racially segregated system is still maintained, the Defendants' legal position under this motion is that the Plaintiffs have not set forth a claim entitling them to relief. So far as this record shows, the Defendant school authorities have not to this day ever acknowledged that (a) the present system is constitutionally invalid or (b) that there is any obligation on their part to make any changes at any time. At this late date the Plaintiffs, who represent Negro children who are presently being denied constitutional rights, are entitled to minimum effective relief. With the trial date now fixed in November, it means that effective relief is denied for another school year with no assurance that even at such later date anything but a reaffirmation of the teaching of the **Brown** decision will be forthcoming. The Plaintiffs showed a clear case entitling them to interim relief pending a final hearing, and it was an abuse of the District Court's discretion not to enter a preliminary injunction.

The "All Writs" statute, 28 USCA, § 1651, gives us the power to grant the relief sought by Plaintiffs. **Stell v. Savannah-Chatham County Board of Education**, 5 Cir., 1963, ... F. 2d ... [No. 20557, May 24, 1963]. However, as in that case, we think it more appropriate to frame the injunction and direct by mandate that this injunction be made the order of the District Court.

It is, therefore, Ordered that the District Court for the Southern District of Alabama enter the following judgment and order:

> "The Defendant, Board of School Commissioners of Mobile County and the other individual Defendants (naming them specifically) and their agents, servants, employees, successors in office and those in concert with them who shall receive notice of this order, be

and they are hereby restrained and enjoined from requiring and permitting segregation of the races in any school under their supervision, from and after such time as may be necessary to make arrangements for admission of children to such schools on a racially non-discriminatory basis with all deliberate speed, as required by the Supreme Court in Brown v. Board of Education of Topeka, 1955, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083.

"It is further ordered, adjudged and decreed that said persons be and they are hereby required to make an immediate start in the desegregation of the school of Mobile County and that a plan be submitted to the District Court by August 1, 1963, which shall include a statement that the maintenance of separate schools for the Negro and white children of Mobile County shall be completely ended with respect to the first grade during the school year commencing September, 1963, and with respect to at least one successively higher additional grade each school year thereafter."

The District Court may modify this order to defer desegregation of rural schools in Mobile County until September, 1964, should the District Court after further hearing conclude that special planning of administrative problems for rural schools in the county make it impracticable for such schools to start desegregation in September, 1963.

This order shall remain in effect until the final determination of the appeal of the within case in the Court of Appeals for the Fifth Circuit on the merits, and until the further order of this Court. During the pendency of this order the trial court is further directed to enter such other and further orders as may be appropriate or necessary in carrying out the expressed terms of this order.

The Clerk is directed to issue the mandate forthwith.

Bell, Circuit Judge, Dissenting:

I dissent. I would support the view of the District Judge that the time remaining before the opening of school in September is insufficient to make the change from a segregated to a desegregated school system as requested.

The chance of disruption of the educational process in Mobile likely to be encountered in planning and effecting the necessary changes on such short notice outweighs the damage which may be incurred by Plaintiffs in waiting another year. Thus, I would not hold that the District Judge abused his discretion. The loss of the year can be made up by requiring that two grades be desegregated beginning in 1964. I would join in the order if it encompassed this change.

Time for the effectuation of orderly school management procedures is essential, and we should be careful not to give rise to an untoward situation in school administration at this late hour. Registration for the upcoming term has been completed, and school officials and staffs are in the vacation season. This is particularly so where we are passing on a motion in a case not filed until March, 1963.

A true copy.

Teste:

Edward W. Wadsworth,
Clerk, U. S. Court of Appeals, Fifth Circuit.
By Windhorst, Jr.,
Deputy.

New Orleans, Louisiana Aug. 5, 1963

(Seal)

In the
United States Court of Appeals
For the Fifth Circuit.

No. 20,657.

Birdie Mae Davis et al.,
Appellants,
versus
Board of School Commissioners of Mobile County et al.,
Appellees.

On Motion for Injunction Pending Appeal and for Other Orders.

(July 18, 1963.)

On Petition for Rehearing.

Before Brown, Wisdom and Bell, Circuit Judges.

Per Curiam: This matter is before the Court on the petitioners' application for a rehearing.

July 9, 1963, this Court by mandate directed the District Court to enter an injunction and order requiring the Board of Commissioners of Mobile County to submit to the District Court by August 1, 1963, a step-ladder plan for desegregating the public schools in Mobile, starting with the first grade in September 1963. Three days later, another panel of the Court decided **Armstrong v. Board of**

Education of the Citv of Birmingham, No. 20595. In that case the Court declined to issue an injunction pending appeal which would go so far as to provide "when and how the complete desegregation of the public schools may be accomplished." The Court's mandate requires the Birmingham School Board to submit by August 19, 1963, a plan for an immediate start in desegregation by applying the Alabama Pupil Placement Law to all school grades.

At this initial stage in the travail of desegregating the public schools in Alabama, the School Boards of Mobile and Birmingham face substantially the same social, legal, and administrative difficulties. We express no opinion of the merits of uniformity in school desegregation as against a school board's tailoring a plan and a trial judge's shaping a decree, to fit a particular school system. But we have reached the conclusion that at this early point in the legal proceedings, at a time when no school board in Alabama has formulated any plan for desegregation, there should not be one law for Birmingham and another for Mobile. We have decided therefore to conform the Mobile order to the Birmingham order.

Accordingly, the Court amends the judgment and order of July 9, 1963, issued as the mandate, by deleting the following paragraph:

> "It is further ordered, adjudged and decreed that said persons be and they are hereby required to make an immediate start in the desegregation of the school of Mobile County, and that a plan be submitted to the District Court by August 1, 1963, which shall include a statement that the maintenance of separate schools for the Negro and white children of Mobile County shall be completely ended with respect to the first grade during the school year commencing September 1963, and with respect to at least one successively higher additional grade each school year thereafter."

and, in lieu thereof, directs the District Court for the Southern District of Alabama to enter the following paragraph as its judgment and order:

> "It is further ordered, adjudged and decreed that said persons be and they are hereby required to submit to this Court not later than August 19, 1963, a plan under which the said defendants propose to make an immediate start in the desegregation of the schools of Mobile County, Alabama, which plan shall effectively provide for the carrying into effect not later than the beginning of the school year commencing September 1963 and thereafter of the Alabama Pupil Placement Law as to all school grades without racial discrimination, including 'the admission of new pupils entering the first grade, or coming into the County for the first time, on a nonracial basis,' **Augustus v. Board of Public Instruction**, 5 Cir. 1962, 306 F. 2d 862, 869 (that opinion describes such a plan which has been approved and is operating in Pensacola, Florida)."

As in the **Birmingham** decision, the order contemplates a full hearing before the District Court. The District Court will therefore go forward with the trial already fixed for November 14, 1963.

Except to the extent expressly granted herein, the petitioners' application for a rehearing is denied.

The Clerk is directed to issue the mandate, as amended, forthwith.

Bell, Circuit Judge, concurring in part and dissenting in part:

The modification by the majority of their prior order in this case compounds error. Of course, I agree to the mod-

ification to the extent that it may alleviate disruption of the educational process in Mobile during the 1963-1964 school term.

My understanding of this latest order is not altogether clear. It appears to simply require activation, under some plan yet to be worked out, of the Alabama School Placement Law which was adopted by the Legislature of that State in 1957, and which was approved as constitutional on its face in **Shuttleworth v. Birmingham Board of Education**, N. D. Ala., 1958, 162 F. Supp. 372, affirmed 358 U. S. 101, 79 S. Ct. 221, 3 L. Ed. 2d 145. It is not likely that any appreciable amount of desegregation will take place under that law at this late date. The protective measures assured by Judge Lynne in the **Armstrong** case of a hearing on complaints if and where the plan or law is administered on the basis of race on five days' notice is not present in Mobile. It is an inherently complicated law providing many factors which may be considered in making pupil assignments. We have only recently eliminated two of them in the Atlanta school case where we said that the use of scholastic standards and personality interviews as a basis in transfer and assignment were illegal per se when applied only to Negroes: **Calhoun v. Latimer**, No. 20,273, 5 Cir., 1963, . . . F. 2d . . . Others were eliminated or limited when that case was in the District Court. **Calhoun v. Board of Education**, N. D. Ga., 188 F. Supp. 401. Working out a meaningful plan will not be easy, and will require more than the cursory and perfunctory treatment the case has received here.

Moreover, what was done in Birmingham may or may not be relevant to Mobile. The case there had been pending in the District Court some three years. The District Court conducted a hearing and had certain representations from the school board as to how the Pupil Placement Law would be administered. There no party has ever mentioned using this law. The District Court has never considered it.

This case is set for trial on the merits in November. A pending motion to dismiss is set at the same time. The District Court has ordered the school board to propose at that time a plan for desegregation of the school system beginning in September 1964 within the teachings of the Supreme Court on that subject.

It has been the position of appellants that their ultimate right to a desegregated school system is cast in doubt by the pending motion to dismiss, and the fact that the case is set for trial on the merits even though the school system is now segregated. One of the real thrusts of the appeal is their contention that they cannot be certain that desegregation will become a reality in the school term commencing in September 1964 because of this posture of the case. An order of the type originally entered but making desegregation effective with the beginning of school in September 1964, and in at least two grades, should serve to dispel this doubt and the record warrants such an order. It warrants nothing more. The school board would have the opportunity in the interim of formulating a desegregation plan, subject to court approval, and making ready for the good faith adaptation of the plan.

The modification has been neither sought nor considered and will come as a great surprise to all. It will in all probability be ineffective. I do not understand the inordinate hurry in this case. It has only been pending three and one half months. It has been to this court twice in that short time.

Probably no party will consider the relief granted or denied to be a victory but what has been done is at the expense of the judicial process. A Court of Appeals should not sit as a District Court in chancery to mold and enter an equitable decree affecting an entire school system in a metropolitan community without hearing from the parties

on the nature of the decree, and without facts before it to serve as a basis for the decree. The All-Writs Statute, 26 U. S. C. A., § 1651, does not authorize this. It must contemplate rules of procedure, notice, record facts, and an opportunity to be heard, all after time for consideration by the District Court. It applies only in cases of emergency proportions. To state this belief is to at once demonstrate that I cannot join in the procedure here. Therefore, I must dissent, except as otherwise stated, with the admonition that more constitutional rights will be lost than gained in the long run by departure from procedures which have stood the test of time, and which are a part of due process of law as we have heretofore known it. In fact, more may be eventually lost in this very case.

While this appeal must have been considered as presenting something in the nature of a judicial emergency in the beginning; otherwise it would not have been twice advanced over the many other cases pending in this court, it is plain to me that it now has no emergency proportions. I would remand it to the District Court for action on the basis of reasoned and informed discretion in the light of necessary facts and argument, consistent with the law in the premises and the guidelines which I have set out regarding September 1964.

In the
United States Court of Appeals
For the Fifth Circuit.

No. 20657.

Birdie Mae Davis, et al.,
Appellants,

versus

Board of School Commissioners of Mobile
County, et al.,
Appellees.

Appeal from the United States District Court for the
Southern District of Alabama.

(June 18, 1964.)

Before Maris,* Gewin and Bell, Circuit Judges.

Gewin, Circuit Judge: This appeal presents for our review litigation with respect to the desegregation of the public school system of Mobile County, Alabama. The case has received the attention of this Court on two former occasions. The first time it arose on a petition in the nature of an appeal from an alleged denial of injunctive relief, which petition was grounded on the premise that the failure of the District Court to rule promptly constituted a denial of relief and was therefore an appealable order. In addition the petitioners sought relief in the nature of an application for writ of mandamus directed to the District Judge. The petition

* Of the Third Circuit, sitting by designation.

was denied and the appeal dismissed. **Davis v. Bd. of School Commissioners of Mobile County, Alabama** (5th Cir. 1963), 318 F. 2d 63.

After hearing in the District Court, an appeal was taken, and the cause was advanced on our docket pursuant to a motion for an injunction pending appeal. This Court granted the injunction pending appeal on July 9, 1963, and on petition for rehearing amended its order on July 18, 1963. **Davis v. Bd. of School Commissioners of Mobile County, Alabama** (5th Cir. 1963), 322 F. 2d 356, cert. den. 84 S. Ct. 170. We now consider the appeal on the merits.

In its original order dated June 24, 1963, the District Court denied injunctive relief against the Board of School Commissioners as sought by the plaintiffs (appellants). **Davis v. Board of School Commissioners of Mobile County, Alabama** (D. C. S. D. 1963), 219 F. Supp. 542. Following our decision, *supra*, the District Court entered its order dated July 11, 1963, amended July 26, 1963, pursuant to the mandate of this Court. Thereafter the School Board presented a plan to the District Court for its consideration. After a hearing on objections resulting in some modifications, the District Court approved the plan and the plaintiffs appealed. The plan operated during the school session commencing in September, 1963, but was limited to the 12th grade, and it was not applied to rural schools.

We deem it unnecessary to set forth the details of the proposed plan except to say that it was based essentially upon the Alabama Pupil Placement Law. While somewhat more detailed and precise, the **Mobile** plan was similar in many essential respects to the plan proposed in **Birmingham, Armstrong v. Bd. of Education of the City of Birmingham, Alabama** (20,505 5th Cir. 1964). . . . F. 2d . . . , the opinion in which has been rendered simultane-

ously with this opinion. It should be noted that the mandates of this Court in **Mobile** and in **Birmingham**, when we granted an injunction pending appeal, are essentially identical, except that in **Mobile** the District Court was authorized to defer desegregation of rural schools in Mobile County until September, 1964.[1] There are other differences in the two cases. For example, in **Mobile** the Board of School Commissioners operates the entire school system for Mobile County and there is one Superintendent of Schools for the entire county. Differences which do exist are not material to our consideration here.

As mentioned above, we have rendered our opinion on the merits of the **Birmingham** case simultaneously with this opinion. Our decision in **Birmingham** is controlling here, and we consider it unnecessary to repeat now what was there said, except to point out some of the more salient factors with respect to minimum requirements in school desegregation cases of this type. We emphasize here as we did in **Birmingham**, that plans for desegregation must now proceed at a swifter pace in view of the ten-year period which has elapsed since the first **Brown** decision;[2] the responsibility and duty resting on school boards to provide a constitutional plan of desegregation; the necessity for the constitutional administration of the Alabama Pupil Placement Law without regard to race or color; the hearing of complaints by the District Court with respect to the denial of constitutional rights, thus avoiding cumbersome administrative procedure, timely

[1] "The District Court may modify this order to defer desegregation of rural schools in Mobile County until September 1964, should the District Court after further hearing conclude that special planning of administrative problems for rural schools in the county make it impracticable for such schools to start desegregation in September 1963." Davis v. Board of School Com'rs of Mobile County, Ala. (5th Cir. 1963), 322 F. 2d 356.

[2] Brown v. Board of Education, 347 U. S. 483 (1954). See also the implementing decision, Brown v. Board of Education, 349 U. S. 294 (1955).

notice of the plan to interested persons; the abolition of dual school zones, areas, or districts;[3] and the retention of jurisdiction by the District Court for further implementation and supervision.

Upon consideration of the evidence before us and giving consideration to the circumstances here involved, it is our conclusion that this cause be remanded to the District Court with instructions to require the Board of School Commissioners of Mobile County, Alabama, to present to the District Court forthwith for its consideration a plan of desegregation which will meet the minimum standards set forth and outlined in the **Birmingham** case.

The order of the District Court heretofore entered on June 24, 1963, denying injunctive relief is vacated; the orders of the District Court entered on July 11 and 26, 1963, pursuant to our mandate in this case, are continued until modified by the District Court; and the cause is remanded for the entry of appropriate orders not inconsistent herewith.

---

[3] As to such dual districts, school zones, or areas, the brief of the Board of School Commissioners states:

> "By implication, at least, in reference to attendance at schools of the district of the residence of each of the pupils when the plan has progressed to that particular grade, the system would be operating under a single-type district or attendance area arrangement. Again, without all of the testimony adduced in the trial of the cause on the merits, before this court presently, it is difficult to present the entire picture. At the time of the trial on the merits, the Superintendent testified that there were only a few dual zones within the system presently. He further testified that a major re-evaluation and re-draft of the school districts was in progress, or about to commence, which would eliminate even those few dual districts that existed. Consequently, the objection by appellants to this aspect of the plan is one of letter rather than substance."

United States Court of Appeals
For the Fifth Circuit.

October Term, 1963.

No. 20657.

(D. C. Docket Number 3063-63-Civil.)

Birdie Mae Davis, et al.,
Appellants,
versus
Board of School Commissioners of
Mobile County, et al.,
Appellees.

Appeal From the United States District Court for the Southern District of Alabama.

Before Maris*, Gewin and Bell, Circuit Judges.

Judgment.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that this cause be, and the same is hereby remanded to the said District Court with instructions to require the Board of School Commissioners of Mobile County, Alabama, to present to the District Court forthwith for its consideration of a plan of desegregation which will meet the minimum standards set forth and outlined in the **Birmingham** case, being cause No. 20595 on the docket of this Court. The order of the District Court heretofore entered on June 24, 1963, denying injunctive relief, is vacated; the orders of the said District Court entered on July 11 and 26, 1963, pursuant to the mandate of this Court in this case, are continued until

* Of the Third Circuit, sitting by designation.

modified by the District Court, all in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Board of School Commissioners of Mobile County, and others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

June 18, 1964.

Issued as Mandate: June 18, 1964.

Recoverable Costs:

Docketing cause, etc. $25.00

---

[560]

In the United States Court of Appeals
For the Fifth Circuit.

No. 20,657.

Birdie Mae Davis, et al.,
Appellants,
vs.
Board of School Commissioners of Mobile County, et al.,
Appellees.

Appeal From the United States District Court
For the Southern District of Alabama.

(July 21, 1964.)

On Petition for Rehearing.

Before Maris*, Gewin and Bell, Circuit Judges.

Per Curiam:

It is Ordered that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby Denied.

U. S. Court of Appeals. Filed July 21, 1964. Edward W. Wadsworth, Clerk.

* Of the Third Circuit, sitting by designation.